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OCTOBER TERM, 1978

Nos. 78-432, 78-435, 78-436

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
KAISER ALUMINUM & CHEMICAL CORPORATION,
UNITED STATES AND EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

v.

BRIAN F. WEBER, ET AL.

BRIEF OF THE NATIONAL MEDICAL ASSOCIATION, INC. THE NATIONAL BAR ASSOCIATION, INC. AND THE NATIONAL ASSOCIATION FOR EQUAL OPPORTUNITY IN HIGHER EDUCATION AMICI CURIAE

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BRIAN F. WEBER, ET AL.

BRIEF OF
THE NATIONAL MEDICAL ASSOCIATION, INC.
THE NATIONAL BAR ASSOCIATION, INC.
AND
THE NATIONAL ASSOCIATION FOR EQUAL OPPORTUNITY IN HIGHER EDUCATION
AMICI CURIAE

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 564 F.2d 217 (1977). The opinion of that court denying rehearing is reported at 571 F.2d 337 (1978). The opinion of the United States District Court for the Eastern District of Louisiana is reported at 415 F. Supp. 761 (1976).

JURISDICTION

The petition for a Writ of Certiorari was filed on September 14, 1978 and granted on December 11, 1978. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Whether, in the absence of a judicial determination of past discrimination, an employer and a union may enter into a collective bargaining agreement, adopting a training program, based inter alia, upon a racial criterion, to remedy the historical exclusion of Blacks from craft positions of one of the employers plants.

CONSENT TO FILING

This Amici Curiae is being filed with the consent of all parties to the proceeding.

INTEREST OF THE AMICI CURIAE

The National Medical Association is a professional organization which represents the 9,300 American Physicians who are black. The objectives of the National Medical Association are to raise the standards of the medical profession and of medical education; to stimulate favorable relationships among all physicians; to nurture the growth and diffusion of medical knowledge; to sponsor the education of the public concerning all matters affecting the public health; to sponsor the enactment of just medical laws; and to eliminate religious and racial discrimination and segregation from American medical institutions.

The Association was formed in 1895 in Atlanta, Georgia, and incorporated in St. Louis, Missouri, August 31, 1923, under the laws of the State of New Jersey.

The Association maintains national headquarters at 1720 Massachusetts Avenue, N.W., Washington, D.C. (20036). It publishes a monthly scientific journal entitled The Journal of the National Medical Association and an all membership news and features publication entitled NMA News. Its president is Dr. Jesse Belmont Barber, Washington, District of Columbia.

The National Bar Association, 1900 L Street, N.W., Washington, D.C. 20036, is a professional membership organization which represents the more than 7,000 black attorneys, judges and law students in the United States. The officers of the Association are are follows:

President	Junius W. Williams, Esq.—Newark, NJ
President-Elect	Robert L. Harris, Esq.—San Francisco, CA
Vice President	William A. Borders, Esq.—Washington, DC
Vice President	Ronald S. Samuels, Esq.—Chicago, IL
Vice President	Ruth Harvey Charity, Esq.—Danville, VA
Vice President	Warren H. Dawson, Esq.—Tampa, FL
Secretary	Arnette R. Hubbard, Esq.—Chicago, IL
Treasurer	Arthenia L. Joyner, Esq.—Tampa, FL

The National Bar Association was incorporated under the laws of the State of Iowa in 1925, over two decades before black attorneys were allowed membership in the American Bar Association, and at the time

when very few law schools in the United States admitted black students.

The Articles of Incorporation of the National Bar Association state the objectives of the Association, in part, as being:

> ". . . to advance the science of jurisprudence, uphold the honor of the legal profession, . . . and protect the civil and political rights of all citizens of the several states of the United States."

One of the primary reasons for the birth of the Association in 1925, was to achieve equalization of opportunities for minorities in the legal profession in order to further the goal of equal justice for all. In its fifty-four years, the Association has seen the number of black attorneys in the United States grow from a fraction of a percentage of the total, to almost two percent today. However, Blacks, as well as other minorities and women, are still grossly under-represented in the legal profession and also the medical and other professions.

Thus far, the most effective methods proven to ameliorate that condition and certainly the most critical factors in doubling the number of black attorneys in America in the past decade, has been the affirmative action programs initiated in a number of law schools since around 1968. This was also the year that the National Bar Association, in partnership with the American Bar Association, the American Association of Law Schools and the Law School Admissions Council, founded the Council on Legal Education Opportunity whose stated goal was to increase the enrollment of minority students in American law schools.

The legal profession has perhaps been more significant than any other in shaping the fortunes and destinies of the American people, majority and minority alike. It is common knowledge that until a few years ago, all but a miniscule number of Blacks were excluded from the profession. In fact, as recently as 1950, Blacks were forced to invoke the powers of the United States Supreme Court in order to gain admission to tax-supported law schools in parts of this country. Although the situation has improved somewhat today, it would not be inaccurate to state that at our present rate of progress, we are still many years away from true equality in our justice system and proportionate representation of Blacks in the legal profession. Consequently, this country cannot achieve true equality of opportunity without affirmative action to correct past societal discrimination.

Blacks and other minorities, as well as women, stand to lose tremendous grounds which have been accomplished under the rubric of affirmative action. By affirmative action, we mean those series of programmatic efforts designed to fully integrate minorities and women in this country into equal employment opportunity, minority entrepreneurship and equal educational opportunity.

The National Association For Equal Opportunity in Higher Education (NAFEO), 2001 S Street, N.W., Washington, D.C. (20009), founded in 1969, is a nonprofit, voluntary, independent association of 105 historically black colleges and universities enrolling some 200,000 students.

Its Board of Directors and officers are as follows:

President—Dr. Charles "A" Lyons, Jr., Fayetteville State University, North Carolina

Vice-President—Dr. Luther H. Foster, Tuskegee Institute, Alabama

Vice-President—Dr. Frederick S. Humphries, Tennessee State University, Tennessee

Vice-President—Dr. J. Louis Stokes, Utica Junior College, Mississippi

Secretary—Dr. Milton K. Curry, Jr., Bishop College, Texas

Treasurer—Dr. M. Maceo Nance, Jr., South Carolina State College, South Carolina

Immediate Past President—Dr. Herman R. Branson, Lincoln University, Pennsylvania

Dr. Ernest A. Boykins, Mississippi Valley State University, Mississippi

Dr. Oswald P. Bronson, Bethune, Bethune-Cookman College, Florida

Dr. Samuel D. Cook, Dillard University, Louisiana

Dr. Norman Francis, Xavier University, Louisiana

Dr. Charles L. Hayes, Albany State College, Georgia

Dr. Allix B. James, Virginia Union University, Virginia

Dr. Luna I. Mishoe, Delaware State College, Delaware

Dr. Lionel H. Newsom, Central State University, Ohio

Dr. John A. Peoples, Jr., Jackson State University, Mississippi

Dr. Henry Ponder, Benedict College, South Carolina

Dr. Prezell R. Robinson, Saint Augustine's College, North Carolina

Dr. James A. Russell, Jr., Saint Paul's College, Virginia

Dr. Julius S. Scott, Jr., Paine College, Georgia

Dr. Harison B. Wilson, Norfolk State College, Virginia

Executive Director—Dr. Samuel L. Myers[1]

NAFEO is organized to articulate the need for a higher education system where race, income, and previous education are not the determinants of either the quantity or quality of higher education.

This is an association of those colleges and universities which are not only committed to this ultimate goal, but are now fully committed in terms of their resources, human and financial, to achieving this goal. The Association seeks to provide a unified framework representing historically black colleges in their attempt to continue as viable forces in American society.

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[1] See Appendix A, which list the Presidents of the traditionally Black Institutions of Higher Education which constitute the membership of the National Association for Equal Opportunity in Higher Education.

Black colleges were founded to serve those who have been severely crippled by over 200 years of dehumanizing slavery and chronic poverty. The main goal of this Association, through the efforts of its collective membership, continues to be the elevation of disadvantaged youth to creative citizenship.

These institutions, which enroll upwards of 200,000 students, have historically enabled those who were disenfranchised, exploited and humiliated to gain access to intellectual, cultural, moral and spiritual offerings. Since 1966, these institutions have awarded more than a quarter of a million undergraduate, graduate and professional degrees. They have been the providers and architects of equal educational opportunity with attainment and productivity for thousands of their students.

These institutions have been more committed to an open society in which racial and economic disadvantages can be overcome than any other educational institutions. They are totally committed to the production of graduates from families whose economic background makes the attainments of a college education almost impossible. Indeed, the historically black colleges are exemplars of policies and practices that, if used w dely across the country, could move the nation toward equal opportunity and effective "Affirmative Action."

The several Amici have unique interest in the resolution of this case by the Supreme Court. This case raises questions of great importance about the permissible scope of voluntary affirmative action under Title VII. Affirmance of that lower court's proscription against voluntary affirmative initiative will chill

voluntary affirmative action programs in particular and affirmative action generally.

STATEMENT OF THE CASE

Kaiser Aluminum and Chemical Corporation operates a plant in Gramercy, Louisiana. In 1969, a utilization study[1] done by the Office of Federal Contract Compliance (OFCC) revealed that while the local population was approximately 46% black and the local labor force was 39% black, less than 2% of the skilled craft positions at Kaiser's Gramercy plant were held by black employees. By 1974, the percentage of Blacks at the Gramercy plant increased only slightly.[2]

This gross disparity between the percentage of Blacks in the relevant labor force and the percentage of black employees in skilled craft positions of Kaiser's Gramercy plant was attributed to a history of discriminatory employment practices of unions and employers in the various skilled craft industries. There is also strong indication that the disparity was due to discrimination by Kaiser.

In an effort by Kaiser and the union, "to eliminate, so far as possible, the last vestiges of an unfortunate and ignominous page in this country's history," *Albemarle Paper Company* v. *Moody*, 422 U.S. 405, 418, in 1974 Kaiser signed a collective bargaining agreement with the United Steelworkers of America, AFL-CIO. The Agreement benefited both the white and black employees of Kaiser. By removing the requirement

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[1] 41 CFR 60-2.

[2] The percentage of black employers at the plant increased by approximately 1%.

for prior craft experience, to qualify for on-the-job training and by agreeing to recruit its future craft employees from within rather than at the gate, as the previous practice had been, this Agreement under attack by Weber conferred substantial benefits to the white employees. In order not to reinforce and continue the effects of prior discrimination and exclusion of Blacks from the work force, the Agreement created dual seniority lines: one black and one white. The Agreement established an entrance ratio of at least one qualified minority worker to every white worker until such time as the percentage of minority workers in craft positions at Kaiser's plants was commensurate with the percentage of minorities in the relevant force. To implement this plan, dual seniority lists were established. For every two vacancies in the training program, one white and one black employee were to be selected on the basis of their seniority within their respective lines.

In April of 1974, the Gramercy plant announced that there were three programs available for on-the-job training. All plant employees were eligible to bid for the positions. Eligibility for admission was determined on the basis of plant seniority. However, black and white applicants were selected from their separate seniority lists.

Respondent Weber, a white employee at Kaiser's Gramercy plant, applied for each of the training programs but was not selected. Two black applicants with less plant seniority than Weber were selected. Weber subsequently filed a complaint in the District Court for the Eastern District of Louisiana. While relying upon parts of the Agreement under assault, he challenged that part of the Agreement providing for dual

seniority as being in violation of Sections 703(a) and (d) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), (d). The District Court held that Kaiser's plan was violative of Title VII. Further, that affirmative action programs can be imposed only after a judicial determination of past discrimination.

The Court of Appeals for the Fifth Circuit affirmed one judge dissenting.[3] However, the Court rejected the District Court's conclusion that affirmative action programs can be imposed only after a judicial determination of past discrimination. It agreed with the District Court that in this instance the use of racial quotas violated Title VII. This determination was based on the District Court's ruling that Kaiser had no history of discriminatory employment practices against Blacks.

The Court of Appeals rejected appellant's contention that if the racial quota was not sanctioned by Title VII, it was sanctioned by Executive Order 11246 and the OFCC regulations. The Court held that the Executive Order and OFCC regulations must give way to the congressional mandate of Title VII, and that Title VII does sanction the use of the racial criterion herein employed.

I.

THE CIRCUIT COURT ERRED WHEN IT CONCLUDED THAT A PLAN WHICH GIVES RACIAL PREFERENCE IS VIOLATIVE OF TITLE VII, IN THE ABSENCE OF A SHOWING OF PAST DISCRIMINATION

In the field of employment, societal discrimination has particularly gruesome effects on the lives of those who are the objects of that discrimination. These evil

[3] Judge Wisdom dissented.

effects may never be mitigated without some form of preferential treatment. Justices Brennan, White, Marshall, and Blackmun have acknowledged this assertion, evidenced by the following language:

> "Thus, our cases under Title VII of the Civil Rights Act have held that, in order to achieve minority participation in previously segregated areas of public life, Congress may require or authorize preferential treatment for those likely disadvantaged by societal racial discrimination. Such legislation has been sustained even without a requirement of findings of intentional racial discrimination by those required or authorized to accord preferential treatment, or a case-by-case determination that those to be benefitted suffered from racial discrimination. These decisions compel the conclusion that States also may adopt race-conscious programs designed to overcome substantial, chronic minority underrepresentation where there is reason to believe that the evil addressed is a product of past racial discrimination. (*Regents of the University of California* v. *Bakke,* —— U.S. ——, 98 S.Ct. 2733, 2787. See Justice Powell's response at page 2658, fn. 44).

And Professor Jones has likewise observed that,

> "The most difficult job in eradicating racial discrimination in employment is the task of eliminating the present effect of past discrimination." Jones, *The Bugaboo of Employment Quotas,* 1970 Wisc. L. Rev. 341, 342.

The history of this past discrimination was the impetus for the enactment of Title VII of the Civil Rights Act of 1964. It demonstrates that Congress realized that the present effects of past racial discrimination could not be remedied by being neutral on the question of race, in the area of employment. What is needed and

what Congress intended, was preferential treatment: judicially mandated, administratively imposed, or voluntarily adopted.

Blacks have suffered the dehumanizing effects of racism since the inception of this nation. Fear and racial hatred have assumed many disguises throughout our history. For though the chains and whips have been discarded, more sophisticated methods and institutional practices are used today to perpetuate the effects of racism.

In both the North and the South, the black slave was barred from almost every avenue leading to a productive, dignified existence. And his experience in the labor market, over the last two centuries, is one of the best illustrations of the lasting effects of institutionalized slavery.

In the South, after the Civil War, the black man seeking a job found that the years of enslavement had predetermined that he was to be admitted to the lowest forms of employment, even though, quite frequently, he was a skilled craftsman. It is commonly known that during slavery, Blacks were used as domestics and unskilled laborers. A less commonly known fact is that the slaves, ". . . were also, to a large extent, the craftsmen and mechanics. They were carpenters, bricklayers, painters, blacksmiths, harness workers and shoemakers. For even skilled labor was degraded and whites had often been denied the opportunity of acquiring training since masters had preferred to work with slaves." Myrdal, Gunther, *An American Dilemma,* (New York, 1944). White artisans strongly protested against the use of slaves for skilled craft labor, but the skilled slave was protected by his more politically powerful master.

However, after the Emancipation, the black artisan was on his own. His former master no longer had an interest in protecting him against his white competitor. See Myrdal, *supra.*

Therefore, the early post Civil War period was marked by a pattern of discrimination against the black worker and his consequent exclusion from the labor market. Thus, in the skilled crafts, as well as mines, factories, and docks, whites gradually moved in and Blacks were left out. And with the rise of craft unionism and the apprentice system in periods between 1865 and 1885, white artisans consolidated their hold on the jobs formerly held by Blacks—particularly those jobs in the building trades and on the railroads.

Technological change had further accelerated the process of substitution; first, by making the skills of the Negro increasingly obsolete, and, secondly, by often rendering the work less strenuous and dirty, thus encouraging the redefinition of former "Negro jobs" as "white men's work."

The history of organized labor tells a similarly sad tale of exclusion of the black worker. "From its inception as a national movement, organized labor found it necessary to deal with the prevailing attitudes of American society toward the blacks population. In 1866, the National Labor Union held its first convention, and was immediately confronted with the need to formulate a policy on racial practices. At its second convention in 1869, it requested black delegates to form their own "all-Negro labor organizations." Ross and Hill, *Employment, Race and Poverty;* (New York, 1967), p. 365. The National Labor Union's policy of exclusion of Blacks was adopted by many major

unions. "The history of the American Federation of Labor (AFL), the most successful national labor organization, demonstrates that labor unions not only accepted racial discriminations but significantly contributed to the pattern of discrimination and segregation." *Ross & Hill,* Id., at 366. AFL unions used a variety of tactics to eliminate or limit Blacks as a group from competition in the labor market. They excluded Blacks from membership by racial provisions in their constitutions or ritual by-laws or by tacit agreement in the absence of written provisions. Segregated locals and "auxiliary" locals are established by the larger unions. The black worker was extended the privilege of joining and paying dues but, generally, he was barred from participating in union affairs and contract negotiations. *Northrop, Organized Labor and the Negro,* (New York, 1971), p. 2. AFL unions also controlled licensing boards that excluded black workers from craft occupations and apprenticeship training programs. *Ross & Hill, supra.* Blacks were also denied access to union hiring halls where such halls were the exclusive source of labor supply.

The consequences of these institutional practices of discrimination against the black worker remain manifest. By the turn of the century, this color-caste system had become firmly entrenched. By 1900, Blacks had become almost completely segregated from the mainstream of labor by law and by custom.

> "In the last years of the nineteenth century and in the first decades of the twentieth, the harsh discriminatory racial practices of AFL-affiliated unions and the railroad brotherhoods were decisive factors in developing the pattern of Negro job limitations that was to continue for many generations. Because of the AFL's craft orientation and discriminatory practices, most unions refused to

> organize Negro workers in the 1900's, thus denying them trade union protection during a period of intense labor exploitation. The consequences of the pattern of discriminatory racial practices by organized labor was an important and in some instances decisive factor in the barring of Negroes from full and equal protection in the economic life of the nation." *Ross, supra.*

And:

> "During the period 1860-1910, craft unions contended that they were not acting with any malice towards Negroes; they did rearticulate, in a new form (into our industrial structure), which has pervaded the social structure and social consciousness of society in the United States. Since "socially," Negro inferiority is sanctioned, unions have used exclusion as an economic weapon to maintain and raise the economic social status of their members. The acceptance of Negro subjugation is linked partially, with economic preservation in an unstable society: the latter fits well with the doctrine of job scarcity. Thus, artificial restriction serves at least a two-fold purpose: (1) it enhances the bargaining power of the union; (2) it increases the union's economic control over its membership." Black, *Labor and the Negro,* 1866-1910, 50 Journal Negro History 163 (1965).

The Blacks who migrated to the North entered the unskilled, manual jobs in steel mills, auto plants, road maintenance, laundries, feed industries and some branches of the needle trades. As a rule, these were the jobs that Whites and immigrants did not want or had vacated to take better positions.

The entry of Blacks into the Northern labor market was further hampered by the prevailing racial attitudes of that period. The white workers strongly resented the

immigration of Blacks to the North, especially when the black workers were brought to the North by employers to be used as strikebreakers, cheap labor, or as a means to avert unionization. See, *Marshall, The Negro and Organized Labor,* (N.Y. 1965) p. 21

The hostility and aggression of the white workers took on many forms. Blacks were victimized and terrorized by riots and other acts of violence. In 1917 and 1919 tensions between the white workers and the Blacks from the South erupted into some of the most bitter and bloody race riots in this country's history. St. Louis and Chicago became the battle-grounds of fierce, racial conflicts.

It is submitted that these open and covert practices of exclusion of black workers had the net effect of securing for the white worker the advantages of job security and economic development. This argues for a reading of the Civil Rights Act and the lawfulness of the Kaiser Plan, in particular, in light of what has been stated above. We argue that it is against this background that steps have been taken to mitigate the conditions of Blacks; to wit, the late President Kennedy's assembling of the Committee on Equal Employment Opportunity. This committee, chaired by the then Vice President Lyndon Baines Johnson, urged some of the major companies to recruit Blacks. This effect resulted in the Lockheed Plant at Marietta, Georgia, the Western Electric Company, and the Bell Telephone System actively recruiting Blacks for jobs as plant supervisors, low and middle management positions. Also, Vice President Johnson had the majority of the "one hundred largest corporations in the country sign pledges to actively further the employment of Negroes and other minorities." By August, 1964, the plan was extended,

and 238 firms with an aggregate employment of 8,000,000 workers, participated. As a result of these pledges:

> "Negro college graduates became the most sought after of the job seekers. Programs were set up at the industry's expense in most major cities, . . . to recruit or to train Negroes in a variety of jobs from machine operators to salesman and from office clerks to computer programmers." *See Ross and Hill, supra* at 298-299.

Employers were therefore actively recruiting minorities in order to increase minority representation at all levels of industry. This acknowledged that Blacks were underrepresented in certain job categories and thus it was found necessary to remedy the inequities caused by employment discrimination. We argue that the Civil Rights Act of 1964 was passed to give legal sanction to this voluntary practice of encouraging the employment of Blacks. This means that race was a most significant criterion for obtaining employment.

It is the position of this brief that the Fifth Circuit Court of Appeals erred in declaring that the voluntary plan adopted by Kaiser, in the absence of specific showing of past discrimination, was in violation of the Civil Rights Act of 1964. The company plant in question, having begun operations only over a decade ago, could not have engaged in the same discriminatory practices as of its older, sister companies. Moreover, the plan adopted parallels the Kennedy-Johnson plan initiated over a decade ago. The Fifth Circuit, by its ruling, suggests that racial classification not be used in voluntary plans adopted by employers to promote the employment of Blacks. But this ignores the fact that the systematic exclusion of Blacks from the labor force now

gives rise to a moral claim that they be given some form of preferential treatment.

This ruling of the court clearly overlooks the history of black workers detailed above; and ignores the moral distinction between a racial classification designed to discriminate against those who have suffered the effect of slavery, and a racial classification that serves to eliminate the plight of these very people who have traditionally suffered from that discrimination.

In concluding, we note that today an inordinately high percentage of the black population are poor. This poverty is a direct consequence of their history of unemployment. The poor are also less educated than Whites. It hardly merits argument to say that there is a correlation between their poverty and their ignorance. For example, on January 10, 1979, when the State of North Carolina announced the results of the state-wide Competency Test, state officials explained that the test results showed that school systems with the higher than average failure rates had two key characteristics in common: relatively low family income and relatively low levels of adult education attainment. Thompson, Roger, "Test Failures Linked to Low Family Income," *The News and Observer,* at 1, (January 11, 1979). It is submitted that these two conditions reinforce each other, thereby creating a vicious cycle out of which the black and the poor may never break, without some form of preferential treatment. And this preferential treatment merely fosters the ideal of equality, a concept articulated in the Constitution. Failing this preferential treatment, these poor will forever remain trapped in this vision of a "second hell."

In political philosophy the concept of equality has been given eloquent treatment. Aristotle, in his *Nico-*

machean Ethics, noted the utter significance of this concept to the "political man" when he stated that "justice is equality as all men believe it to be, quite apart from any argument." Thus, he distinguished two principles of justice: "rectificatory" justice (involving strict or "arithmetic" equality and distributive justice (involving proportional or "geometrical" equality), that is, a distribution in accordance with unequal merit). Aristotle in Book V of the *Nicomachean Ethics* 11319-13.

The principle of numerical equality often considers those respects in which men are different as being irrelevant for the distribution of benefits and burdens among members of society. An obvious advantage of this principle is the ease of administration and the justification of inequalities in terms of social utility. It is submitted that this principle of numerical equality is inappropriate in the distribution of scarce goods, where this simplistic adherence to a kind of formal equality is, by definition, impossible. 1974 Black L.J. 132, 151.

In contrast, the principle of proportional equality takes cognizance of differences among men and may require different treatment based on these differences. *"Developments—Equal Protection,"* 82 Harv. L. Rev. 1160, 1165. These may be differences of merit, or differences of need. The question is whether these differences give rise to any moral claims as a predicate for differential treatment among those who must share the scarce benefits. The reason articulated to justify unequal treatment is all important; for arguments about equality are, in fact, arguments about criteria of relevance.

Professor Ronald Dworkin has contributed much to our understanding of this rather complex concept. In

his major work, *Taking Rights Seriously,* (Harvard University Press, Cambridge, Mass., 1977), he has delineated two principles that take equality to be a political ideal. The first requires that the government treat all those in its charge as equals, that is, as entitled to its equal concern and respect. The second principle requires that the government treat all those in its charge equally in the distribution of some resource or opportunity, or at least work to secure the state of affairs in which they all are equal or more nearly equal in that respect.

The first principle is taken to be fundamental because it purports to recognize the inherent equality of all men. It is conceded that, sometimes, treating people equally is the only way to treat them as equals. But this is not always the case. Take the instance of a mother with two children whom she loves equally. One child is gravely ill; the other is slightly so. The mother, having a very limited supply of medicine, may decide to give half to each child. But, to do this is to ignore the very special need of the child who is gravely ill. In this instance, the mother cannot be said to have treated the children as equals by giving them equal treatment. To treat them as equals she has to take into consideration any special circumstances making for unequal or differential treatment; thus giving to the child who is gravely ill, either all or most of the medicine. This does not say that she has no concern or respect for the child who receives less. Rather, it suggests her concern and respect; and, if the situation were reversed, then, according to the principle upon which the unequal distribution is made, the child who now receives less, would receive more. This example is to make the rather significant point that to treat

people as equals is fundamental, and to accord them equal treatment is derivative of this more fundamental principle.

The question remains: When is it justified to treat people differently—more specifically, when is it justified to treat Blacks differently from Whites. The fact of being black is not, *ipso facto,* a predicate of a moral claim. But the fact of blackness, in correlation with certain other considerations, may give rise to a moral claim for differential treatment.*

Earlier on, we noted that differences among men may be based on need or merit, and in certain circumstances, either of the two may be the basis for differential treatment. But we argue that distribution according to merit operates on principles too closely akin to those at work in the competitive context of the private sector of this society. By making an individual's merit the relevant criterion for determining his proper allocation of burdens and benefits, the State purports to measure—and to reward accordingly—the individual's perceived value to society for some particular purpose. 82 Harv. L. Rev., *supra* at 1166. It harmonizes well with the concept of a free market economy and justifies its use on principles of utility.

This principle, in certain contexts, harbors grave dangers for Blacks, because it ignores the historic reason for their unequal circumstance. The instance of the *Weber* case is instructive, if merit—work experience—were—is taken to be the only relevant basis for the distribution of the scarce benefit. Thus, in the case of merit, one cannot properly speak of the distribution

* Williams, Bernard, "The Ideal of Equality," in H. Bedau(ed) *Justice and Equality* (1971), p. 127.

of a certain good without taking into consideration the distribution of the opportunity of achieving that good. Bernard Williams, p. 127. Therefore, in order to treat all persons equally, to provide genuine equality of opportunity, society must give more attention to those with fewer native assets and to those born into the less favorable positions. The idea is to redress the bias of contingencies in the direction of equality. Rawls, John, *A Theory of Justice* (1971), p. 100. Witness Professor Dworkin's thoughtful and impassioned plea for the proper use of preferential treatment.

> "We are all rightly suspicious of racial classification. They have been used to deny, rather than to respect, the right of equality, and we are all conscious of the consequent injustice. But if we misunderstand the nature of that injustice because we do not make the simple distinctions that are necessary to understand it, then we are in danger of more injustice still. It may be that preferential admissions programs will not, in fact, make a more equal society, because they may not have the effects the advocates believe they will. That strategic question should be at the center of debate about these programs. But we must not corrupt the debate by supposing that these programs are unfair even if they do work. We must take care not to use the Equal Protection Clause to cheat ourselves of equality." Ronald Dworkin, *supra* at 239.

In *Bakke, supra,* at page 2782, in the opinion by Justice Brennan, joined in by Justices White, Marshall and Blackmun, it was observed:

> "The assertion of human equality is closely associated with the proposition that differences in color or creed, birth or status, are neither significant nor relevant to the way in which persons should be treated. Nonetheless, the position that such factors

must be "[c]onstitutionally an irrelevance," *Edwards* v. *California,* 314 U.S. 160, 185, 62 S.Ct. 164, 172, 86 L.Ed. 119 (1941) (Jackson, J., concurring), summed up by the shorthand phrase. "[O]ur Constitution is colorblind," *Plessy* v. *Ferguson,* 163 U.S. 537, 559, 16 S.Ct. 1138, 1146, 41 L.Ed. 256 (1896) (Harlan, J., dissenting), has never been adopted by this Court as the proper meaning of the Equal Protection Clause. Indeed, we have expressly rejected this proposition on a number of occasions."

And Justice Marshall in the same case, *Bakke, supra,* at page 2803, noted:

"In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society. . . .

I do not believe that the Fourteenth Amendment requires us to accept that fate. Neither its history nor our past cases lend any support to the conclusion that a University may not remedy the cumulative effects of society's discrimination by giving consideration to race in an effort to increase the number and percentage of Negro doctors."

And Justice Blackmun:

"I suspect that it would be impossible to arrange an affirmative action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetrate racial supremacy." *Bakke, supra* at 2808.

In the *Weber* case, the applicable statute is Title VII of the Civil Rights Act of 1964. We argue that the statute be read to promote this ideal of equality and foster the intent of the 14th Amendment.

The concept of equality is accorded constitutional status. More specifically, the Equal Protection Clause of the 14th Amendment, by its injunction—"no state shall deny to anyone the equal protection of the law" —makes the concept of equality a test of legislation, although it does not stipulate any fixed conception of that concept. The Constitution fuses legal and moral issues, by making the validity of a law depend on the answer to complex moral problems, like the problem of whether a particular statute respects the inherent equality of all men. Here is a moral right made into a legal right; the concept of an individual's right to equality is thereby made a constitutional right by the Equal Protection Clause. Dworkin, *Taking Rights Seriously, supra.*

This injunction of the 14th Amendment, we have observed, does not take the form of a precise rule but, rather, as a general standard to be appealed to. Not having articulated a particular conception of that standard, the Framers may have intended that the Court be charged with responsibility of developing and applying its own conception of equality as controversial cases arise. This is not to say that the judges are free merely to state their intuitions on the matter. Rather, "the demand is made of the judges that decisions taken in the name of justice must never outstrip their ability to account for these decisions in a theory of justice, even when such a theory must comprise their own intuitions. It demands that we act on principle rather than on faith. . . . It presupposes that articulated

consistency, decisions in accordance with a program that can be made public and followed until changed, is essential to any theory of justice. . . ." Dworkin, *Id.*

Thus, when faced with a case as controversial as *Weber*, the interpretive strategy adopted to render a meaning of the 14th Amendment, and other statutes in question, is of utmost importance. Interpretive strategy means "a method of reading—a direction or set of directions concerning the kind of evidence that may be considered the purpose of reading a particular text, the function or character of the text being read, or any other constraint of a reader's authority." Abraham, Kenneth, *"Intention and Authority in Statutory Interpretation"* (unpublished essay, Associate Professor of Law, University of Maryland School of Law, 1977), p. 2. It is submitted that "no text is accessible apart from the interpretive strategies invoked by its readers."

This comment affords valuable insight in respect to the interpretation of the 14th Amendment and the Civil Rights Act of 1964, within the context of the *Weber* case. The Court must interpret these documents so as to take account of the moral right of the individuals. As we have noted, the Constitution's guarantee of "equal protection of the laws" does not, in plain words, determine that race may never be used as a form of classification for the purpose of distributing a scarce benefit. But neither does it provide that, as a matter of constitutional law, the Court would be wrong to sanction such classification. The problem is to determine when racial classification is justified and when it is not. The foregoing analysis of the concept of equality, argues for an interpretive strategy that takes account of the special circumstances of Blacks in this

society, as making out a moral claim for differential treatment. Such strategy fosters the ideal principle of equality; that is, the principle that holds that people be treated as equals and not merely be accorded equal treatment.

In respect to the Civil Rights Act of 1964, it may be argued that all racial classifications are excluded since the language of the statute seem to suggest that. In short, the authorial intent is suggested by a "literal" reading of the statute. But this is to ignore the thought that: "Literal readings are in fact those which are generated by interpretive strategies so transparent that they are not recognized." Sometimes these readings are correct; but at other times they are clearly inaccurate. Professor Hayden White's observation, taken from a slightly different context, makes the point: "And yet we are faced with the ineluctable fact that even in the most chaste discursive prose, texts intended to represent—'things as they are' without rhetorical adornment or poetic imagery, there is always a failure of intention. Every mimetic text can be shown to have left something out of the description of its object or to have put something into it that is unessential to what some reader, with more or less authority, will regard as an adequate description. On analysis, every mimesis can be shown to be distorted and can serve, therefore, as an occasion for yet another description of the same phenomenon, one claiming to be more realistic, more 'faithful' to the facts." White, Hayden, *Tropics of Discourse—Essays in Cultural Criticism* (Johns Hopkins University Press, 1978), p. 3.

The language of the Civil Rights Act, despite its seeming literalness, has been correctly interpreted by

the Court on previous occasions, not to preclude racial classification *per se.* In *Bakke,* for example, five Justices have decided that it is impossible to decide the case on statutory grounds without reaching the constitutional issue, because the statute does not condemn the Davis program unless the Constitution does. If we are correct that an interpretation of the 14th Amendment that takes account of race, in appropriate circumstances promotes the ideal principle of equality, then the 'lesser' document, Title VII, may not be interpreted to do otherwise.

At a time when Congress had before it overwhelming evidence that Blacks and minorities throughout this country were victims of systematic employment discrimination, H.R. Rep. No. 914, 88th Cong., 2d Sess. (1963), it enacted Title VII. Prior to the enactment Congress made a determination that efforts previously undertaken to "make whole" victims of employment discrimination, were not sufficient to erase the "incidence and depth of inequality [which] remain[ed] widespread. Discrimination continue[d] to exist in all parts of the country." *Id.* at 29.

Faced with studies which revealed that employment discrimination based on race was the rule, rather than the exception, it became evident that a "color-blind" remedy would not adequately achieve equality of employment opportunities.

> "In dealing with employment discrimination cases, the courts and various governmental agencies have demonstrated an awareness that the goal of equal opportunity cannot be effectively implemented solely pursuant to neutral employment practices." Edwards, Harry T., *Race Discrimination In Employment: What Price Equality?* 1976 U. of Ill. L. For. 572, at 591 (1976).

Congress, thus required that employers and labor unions be race-conscious in devising remedies to redress the prevalent problem of employment discrimination. Congress required that employers affirmatively act, ". . . to achieve equality of employment opportunities and remove barriers that . . . operate . . . to favor employees." *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971).

In enacting Title VII, Congress ordered, "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Id.* at 424.

In addition to the removal of barriers to employment opportunities, Title VII was designed to "make whole" persons who have been denied an equal opportunity to earn an equal pay check. *Albemarle Paper Co.,* 422 U.S. *supra* at 417-422. To effectuate this "make whole" objective, Congress has, "vested broad equitable discretion in federal courts to order such affirmative action as may be appropriate, which may include, but is not limited to reinstatement or hiring of employees with or without back pay . . . or any other equitable relief as the court deems appropriate." *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 763 (1976).

Appropriately tailored numerical remedies have long been upheld as a viable means of restoring equality of opportunity to persons historically denied equal employment opportunities. Such remedies insure representation of qualified minorities in a workforce and, "promptly [operate] to change the outward and visable signs of yesterday's racial discrimination and thus, . . . provide an impetus to the process of dismantling the

barriers, psychological or otherwise, enacted by past practices." *NAACP* v. *Allen,* 493 F.2d 614, 621 (5th Cir. 1974). It has been held that absent such numerical remedies, "[a]dequate relief may well be denied." *Id.* at 765.

This Court stated that, "ordinarily such relief will be necessary to achieve the 'make whole' purposes of the Act." *Franks* v. *Bowman Transportation Co., supra* at 766.

In *NAACP* v. *Allen, supra,* where the district court found that because of a history of racial discrimination, there was an absence of Blacks on the state police force, a quota system very similar to the one here at issue, was upheld on the basis that it was, "essential to make meaningful progress toward eliminating the unconstitutional practices and to overcome the patrol's 37-year reputation as an all-white organization . . ."

In *Allen,* the Court ordered the hiring of one qualified black for each white hired as a state trooper until 25% of the force was black. It further ordered that Blacks be admitted to each training position until Blacks comprised 25% of the training positions.*

The Court stated that,

> " . . . affirmative equitable relief grounded on the use of numerical racial quotas has been increasingly utilized by federal courts to eradicate the continuing effect of past discrimination. . . . Such relief has been specifically approved in employment discrimination litigation brought under Title VII . . . of the Civil Rights Act of 1964 . . . and other similar programs, which have been instituted pursuant to Executive Order. . . ." *NAACP* v. *Allen, supra,* at 619-620. *See also, Morrow* v. *Crisler,* 491 F.2d 1053 (5th Cir., 1974) (*en banc*), *cert. denied,* 419 U.S. 895 (1974).

* The 1970 Census revealed that 26.2% of the Alabama population was Black.

By creating dual seniority lines or implementing other affirmative action plans designed to award victims of discrimination seniority status which they presumably would have earned but for the disparate treatment, the employee in no way, "deprives other employees of indefeasibly vested rights conferred by the employment contract." *Franks* v. *Bowman Transportation Co.,* supra. The Supreme Court has long held that the expectations of the majority workforce arising from a seniority system may be altered, amended, or modified to remedy past discrimination. (*See,* Id.)

> "The Court has also held that a collective bargaining agreement may go further, enhancing the seniority status of certain employees for purposes of furthering public policy interests beyond what is required by statute, even though this will to some extent be detrimental to the expectations acquired by other employees under the previous seniority agreement." *Ford Motor Co.* v. *Huffman,* 345 U.S. 330 (1953).

It is submitted that plans designed to provide relief as remedy for past discrimination have been uniformly upheld by the courts. *See, e.g., Carter* v. *Gallagher,* 452 F.2d 315 (8th Cir. 1971) (*en banc*), *cert denied,* 416 U.S. 950 (1972); *United States* v. *I.B.E.W.,* Local 38, 428 F.2d 144 (6th Cir.), *cert, denied,* 400 U.S. 943 (1970); *United States* v. *City of Chicago,* 549 F.2d 415 (7th Cir.), *cert. denied,* 434 U.S. 875 (1977); *Davis* v.

County of Los Angeles, 556 F.2d 1334 (9th Cir. 1977), *cert. granted,* —— U.S. ——, 98 S.Ct. 3087 (1978).

Thus, until the evil effects of past discrimination are eradicated, the courts must continue to sanction race-conscious numerical remedies, where employers do not voluntarily adopt such remedies. In cases where employers, like Kaiser, voluntarily implement programs to erase the last vestiges of historical discrimination, they must be rewarded, and other employers must be urged to follow suit.

In the present case, the district court held that the on-the-job training plan violated Title VII. The trial court took the view that affirmative action programs could be implemented as a form of relief only by the courts and then "only in those limited cases where necessary to cure the ill effects of past discrimination." While the Court of Appeals rejected the District Court's conclusion that only courts could institute remedial programs involving racial quotas, it agreed with the District Court that, on the facts of this case, the use or racial quotas in the selection of those eligible for on-the-job training programs violated Title VII. The court's reasoning is that absent a showing of prior discrimination on the part of the employer, racial preferences could not be employed in response to general societal discrimination. The Circuit Court interpreted section 703(a)(d) and (j). Section (d) to mean:

> It shall be unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

In spite of these provisions of Title VII, the courts have interpreted section 706(g) to authorize all of the judicial remedies previously referred to. Even the Fifth Circuit in the instant case stated that there are exceptions to 703(a) and (j) carried out by the courts for judicial remedies under 706(g). Section 706(g) provides:

> "If the court finds that the respondent has initially engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice and other such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title."

What the Fifth Circuit Court makes pivotal is not judicially erected as opposed to voluntarily instituted programmatic activity, but whether a program may be erected under sections 703(a)(d) and (j) without a showing of prior discrimination by the employer as opposed to societal discrimination.

The question is then reduced to an interpretation of sections (a)(d) and (j) and the intendment of Title VII.

The predicate for interpreting section 706(a) to include the judicial remedies employed by the courts also warrants this Court's conclusion that to promote the intendment of Title VII, voluntary plans are permissible and should be encouraged without a showing of prior discrimination by the employer.

II.

EXECUTIVE ORDER NO. 11246 MANDATES RACIAL QUOTAS IN THE ABSENCE OF ANY SHOWING OF SPECIFIC PRIOR HIRING OR PROMOTION DISCRIMINATION AND IS CONSONANT WITH TITLE VII

A. Executive Order No. 11246 Mandates Racial Quotas Without a Showing of Specific Prior Hiring or Promotion Discrimination

Appellants correctly contend that the Kaiser Plan is also sanctioned by Executive Order No. 11246, as amended, and regulations issued by the Office of Federal Contract Compliance mandating affirmative action by all government contractors.

Executive Order No. 11246, mandating affirmative action on the part of those who would supply the government with goods or services, has been upheld as valid executive action. *Contractors Ass'n of Eastern Pa.* v. *Secretary of Labor,* 442 F.2d 159 (1971).

The Fifth Circuit concluded that "If Executive Order No. 11246 mandates a racial quota for admission to on-the-job training by Kaiser, in the absence of any prior hiring or promotion discrimination, the Executive Order must fall before this direct congressional prohibition." This conclusion is in error because the case law and settled practice make clear that Executive Order No. 11246 mandates and encourages racial quotas in programmatic affirmative action activities, without a finding of past racial discrimination.

Executive Order No. 11246, as amended, is the government's announcement that it will not do business with any employers who discriminate against any employee or applicant on the basis of race, color, religion, sex or national origin.

By this Order, employers are required to take affirmative steps to ensure that employees and applicants are not disparately treated on the basis of race, color, religion, sex, or national origin. EO 11246, § 5.01., 41 C.F.R. § 60-2.

> "The duty of affirmative action requires positive steps to achieve equal employment opportunity for members of minority groups. Such steps include, but are not limited to, employment, upgrading, recruitment, layoff, or termination, rates of pay, and selection for training and apprenticeships." Donegan, Charles, *The Philadelphia Plan: A Viable Means of Achieving Equal Opportunity In The Construction Industry Or More Pie In The Sky?* 20 Kansas L. Rev. 195 (1972).

The Order, as amended, mandates the use of racial goals even absent a showing of specific, prior, employment discrimination. See, *Germann* v. *Kipp,* 14 FEP Cases 1197 (WD Mo., 1977); *Cramer* v. *Virginia Com-*

monwealth University, 415 F. Supp. 673 (ED Va., 1976). Employers are required to set goals and timetables and to engage in active recruitment of Blacks, minorities, and women to correct "under-utilization" in an existing workforce. See, *Germann* v. *Kipp, supra, Cramer* v. *Virginia, supra.*

B. Executive Order No. 11246 Mandating Racial Quotas in the Absence of Any Showing of Prior Specific Hiring or Promotion Discrimination is Consonant With Title VII

President Roosevelt, in 1941, issued the first in a series of executive orders designed to help combat employment discrimination by government contractors. Subsequent to the Civil Rights Act of 1964, Titles VI, 42 U.S.C. §§ 2000d *et. seq.,* and VII, 42 U.S.C. § 2000e *et. seq.,* President Johnson issued Executive Order No. 11246, governing nondiscrimination by government contractors. The order imposed special fair employment obligations on contractors with the federal government and contractors working on federally assisted projects.

Many questions were raised regarding the validity of Executive Order No. 11246 in the face of Title VII. In 1972 Title VII was revised and amended. In the process, the Executive Order Program was subjected to careful scrutiny and its affirmative action aspect received explicit congressional approval. *See, e.g.,* Hearings on H.R. 1746 Before the Gen. Subcomm. on Labor of the House Comm. on Education and Labor, 92d Cong., 1st Sess., at 79, 81-82, 84-85 (statement of W.H. Brown, EEOC Chairman).

In the instant case the Fifth Circuit stated that Executive Orders may not override contradictory con-

gressional expressions. However, it failed to state what contradictory congressional expressions it had in mind.

Congress, as a result of its concern for the absence of Blacks in the American labor force, included § 703(j) in the Civil Rights Act of 1964, as amended, which states:

> "Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization or joint management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex or national origin of such individual or group on account of an imbalance which may exist with respect to the total number of percentage of persons of any race, color, religion, sex or national origin employed . . . in comparison with the total number of percentage of [such] persons . . . in any . . . area, or in the available workforce in any . . . area."

Title VII did not require preferential treatment, nor did Congress intend it to. However, it did not state that preferential treatment was prohibited.

The most important show of congressional support for Executive Order No. 11246, occurred in 1969 where a faction of the Congress sought to amend appropriations for the "Philadelphia Plan," an affirmative action plan providing goals and timetables for minority construction contractors in the Philadelphia area.

At the time of the congressional attack the Comptroller General sought to encourage the Senate Subcommittee on Deficiencies and Supplementals to include a provision limiting the use of funds to finance any contract requiring a contractor or subcontractor

to meet, or make any effort to meet specified goals of minority group employees. The Committee accepted this suggestion and attached a rider to the bill that contained continuing resolutions for the Office of Economic Opportunity, the Department of Health, Education and Welfare, the Agency for International Development and the Department of Labor. *See,* Washington Post, Dec. 20, 1969, at A-1, col. 6. The rider provided:

> "No part of the funds appropriated or otherwise made available by this or any other act shall be available to finance, either directly or through any Federal aid or grant, any contract or agreement with the Comptroller General of the United States holds to be in contravention of any Federal Statute. 115 Cong. Rec. 40.013 (1960).

After vigorous debate in both Houses of Congress the rider was defeated and the "Philadelphia Plan" was saved. See, Schuwerk, Robert P., *The Philadelphia Plan: A Study in the Dynamics of Executive Power,* 39 U. of Chicago L.Rev. 4, 723 (1972).

The legislative history of Title VII indicates that Congress approved future executive action to implement the purpose of the legislation. Credence for this point is found in Congress' attempt to amend the Act prior to final passage. The first proposed amendment submitted by Senator Tower, provided, in substance, that Title VII was to be the exclusive federal remedy for discrimination in employment, eliminating the President's power to issue Executive Orders. That amendment was defeated which evidences congressional recognition and approval of the Executive Order program. The second proposal was the introduction of § 711(b) of the Civil Rights Act of 1964, which provided specific statutory authorization for an executive antidiscrimination program. In the Committee report on H.R. 7152, the majority argued that a statutory foundation for executive order would prevent repeal or change of the program by future presidents, and would endorse presidential action not founded upon any statutory grant of authority. The Committee struck a compromise between supporters and opponents of the legislation. Language in § 711(b) was deleted, but the existing power of the President was not affected. This action on the part of Congress did not limit the powers of the President. Therefore he could institute whatever new executive programs he thought appropriate.

In debates concerning the legality of the Philadelphia Plan, it has often been pointed out that Congress implicitly recognized the existence of the Executive Order Program, including affirmative action requirements and approved its continuation through its passage of the 1964 Civil Rights Act. *See* Jones, *The Bugaboo of Employment Quotas, supra*; Leiken, *Preferential Treatment in the Skilled Building Trades: An Analysis of the Philadelphia Plan,* 56 Cornell L.J. 84 (1970); Note, *The Philadelphia Plan: Equal Employment in the Construction Trades,* 6 Colum J. L. & Soc. Prob. 187 (1970); DuBois, *The Legality of the "Revised" Philadelphia Plan,* 30 Md. L. Rev. 114 (1970); Bickant, *Executive Order 11,246: Anti-Discrimination Obligations in Government Contracts,* 44 N.Y.U.L. Rev. 590 (1969); Hardgrove, *The Philadelphia Plan,* 45 Notre Dame Law, 678 (1970); Krakower, *The Constitutionality of "Affirmative Action" to Integrate Construction Trades: The Philadelphia Plan,* 43 Temp. L.Q. 329 (1970); Comment, *The Philadelphia Plan and Strict Racial Quotas in Federal Con-*

tracts, 17 U.C.L.A. L. Rev. 817 (1970). Persuasive support for executive action to end employment discrimination can be found in 42 Op. Atty's Gen. 592 (1961) (on the legal authority for Exec. Order No. 10,925), and Solicitor of Labor, Legal Memorandum, Authority under Exec. Order No. 11,246 in Hearings on the Philadelphia Plan and S. 931 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. 255 (1969).

Congress reviewed the program that the executive branch had instituted to cope with employment discrimination by federal contractors and specifically rejected efforts to eliminate it or to authorize its expansion. The defeat of this Congressional rider gave new impetus to the OFCC programs. As of October, 1971, forty four metropolitan areas were operating under some variety of OFCC programs, and plans were under study for fifty-six more regions. Hearings on S. 2515, S. 2617, and H.R. 1746 Before the Subcomm. on Labor Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., at 78 (1971) (statement on L.H. Silberman, Under Secretary of Labor).

Several of the plans that had been instituted under Executive Order 11246 were challenged in courts, while revisions of the program were being made. In each instance, the court sustained the executive's actions, holding that the relevant federal or state executive order constituted independent legal authority for imposing affirmative action requirements, whether or not such relief would have been available in suits brought under Title VII. *Joyce* v. *McCrane,* 320 F.Supp. 1284 (1970). *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor,* 442 F.2d 159 (1971). *Southern Illinois Builders Association* v. *Ogilvie,* 471 F.2d 686 (7th Cir. 1972). *Associated General Contractors of*

Massachusetts, Inc. v. *Altshuler,* 490 F.2d 9 (1st Cir. 1973).

In *Contractors Association* v. *Secretary of Labor, supra,* the 3rd Circuit upheld the Philadelphia Plan. The Court decided that executive authority in the fair employment area had been accepted by Congress as a power distinct from its own, and that, therefore, the Philadelphia Plan fell into what Mr. Justice Jackson called the "zone of twilight" in which "Congressional inertia, indifference or acquiescence may . . . enable, if not invite, measures on independent Presidential responsibility." *See Youngstown Sheet and Tube Co.* v. *Sawyer,* 343 U.S. 579, 637 (1952) concurring opinion of Mr. Justice Jackson.

In mid 1971, Congress undertook an evaluation of the impact of Title VII and the related Executive Order Program on the problems of employment discrimination in the debates leading to the 1972 Amendments to Title VII. At that time, the issue of whether 11246 was in conflict with VII, was clearly raised when Congressman Dent offered an amendment by way of substitute to H.R. 1746, the main bill introduced in the House. The Dent amendment was defeated, evidencing the Congress' acceptance of goals and timetables in anti-discrimination programs. The Senate also defeated a series of four major battles attacking the Executive Order mandate of affirmative action.

The Senate also defeated a measure that in effect would have transferred the enforcement of the Executive Order from the Department of Labor to the Equal Employment Opportunity Commission. The provision stated:

> "The rights of minorities and women are too important to continue this important function in an

> agency that has not really been able to achieve the promised results. The contract compliance program is an important and viable tool in the government's efforts to achieve equal employment opportunity. It should have a chance to operate in a fresh atmosphere with an agency that has Equal Employment Opportunities as its sole priority." S. Rep. No. 92-415, at 30-3.

An amendment to strike the aforementioned provision was later introduced by Senator Saxbe. He argued that the affirmative remedies of the Executive Order gave "the promise of equal employment opportunity a new credibility" 118 Cong. Rec. at 1385. Throughout the debate the Third Circuit's opinion in *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor, supra,* was referred to. 117 Cong. Rec. at 31963, 31975; 118 Cong. Rec. at 1671. Senator Saxbe's amendment read:

> "The Executive Order program should not be confused with the judicial remedies for proven discrimination which unfold on a limited and expensive case-by-case basis. Rather, affirmative action means that all Government contractors must develop programs to insure that all share equally in the jobs generated by the Federal Government's spending. Proof of overt discrimination is not required. 118 Cong. Rec. at 1398.

The Senate adopted Senator Saxbe's amendment.

Senator Ervin introduced a final amendment in an effort to have the Senate pass upon the legality of the Philadelphia Plan without being influenced by any extraneous considerations. This attempt would amend section 703(j) to proscribe all of the OFCC's affirmation action programs, by extending section 703(j) to

cover explicit remedies devised by the Executive Order. The amendment provided:

> "Nothing contained in this title or in Executive Order No. 11246, or in any other law or Executive Order, shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title or to any other law or Executive Order to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of imbalance, which may exist with respect to the total number or percentage or persons of any race, color, religion, sex, or national origin employed . . . . in comparison with the total or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section or other area, or in the available work force in any committee, State, section, or other area. S.2275 (daily ed. Feb. 22, 1972).

The Senate by a decisive margin, two-to-one, rejected this final effort to alter the mandate of the OFCC program. Thus the affirmative remedies of goals and timetables was given Congressional sanction.

The court below erred in concluding that the Executive Order was in conflict with Title VII.

III.

THE VOLUNTARY ACTION BY THE EMPLOYER AND THE UNION IN ADOPTING THE PLAN SHOULD BE ENCOURAGED AND PROMOTED

The EEOC has articulated the role of voluntary affirmative action in its Guidelines. Under EEOC Guidelines, where an employer analyzes his employment practices, or a governmental agency charged with

the responsibility of analyzing an employer's workforce, does so, and finds reason to believe that based on past employment practices, there is an absence of Blacks or minorities in its workforce, or that these employees are locked into the lowest paying jobs or the lowest level of seniority, affirmative steps are to be taken to "make whole" these individuals. 29 C.F.R. Part 1608, BNA (D.L.R. 238, E-1).

While the EEOC Guidelines are not administrative "regulations", they do constitute "[t]he administrative interpretation of the Act by the enforcing agency," and consequently are "entitled to great deference." *Albemarle Paper Company* v. *Moody, supra* at 417 (1975). See also, *Griggs* v. *Duke Power Company, supra, Espinoza* v. *Farah Mfg. Co.,* 414 U.S. 86 (1973). 414 U.S. 86, 94.

Under the Guidelines an employer may implement affirmative action plans without proving that he has violated federal law whereas in the case at bar, the employer has reason to believe that his employment practices are either discriminatory or maintain the status quo.

This standard was adopted because it was realized that, as a practical matter, very few employers can be expected to prove that they actually discriminated against a class of their employees. To do so could result in the employers having to award backpay and other relief to the class members discriminated against, in order to put them in their rightful place. This standard would defer affirmative action and frustrate the intent of Title VII. *See Franks* v. *Bowman Transportation Co., supra.*

To realize the intent of Congress in enacting Title VII, employers who reasonably believe that they might be found to have discriminated on the basis of race, must be encouraged to take reasonable race-conscious corrective action. In the instant case it was reasonable for Kaiser to believe that it might be found to have discriminated. In a previous suit, *Parson* v. *Kaiser Aluminum,* 575 F.2d 1374 (1978), the Fifth Circuit found that Kaiser had discriminated in employment in its Chalmette plant. This finding was based on the fact that solely 3% of the craft jobs at that plant were filled by black employees, while there was 20% black representation plantwise. The statistics at the Gramercy plant were worse. In 1971 Kaiser had no blacks in its craft workforce out of a total of 250. By 1974 this number had increased only slightly. Still, less than 2% of the craft positions were filled by black employees. These factors, coupled with threats of the OFCC to take judicial action to force Kaiser to comply with affirmative action guidelines, gave Kaiser more than reasonable grounds to believe that it might be found to have discriminated on the basis of race. (16 FEP cases 2).

In the case at bar, the OFCC utilization study revealed an absence of black employees in the skilled crafts positions at Kaiser's Gramercy plant. Kaiser officials attributed this to the fact that the building trades were the training grounds of its skilled crafts positions and that discrimination in these trades was rampant. These findings, coupled with the fact that, perhaps more than in any other industry, the building and construction industry has excluded Blacks from its ranks,** led Kaiser and the steelworkers to enter

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** Jones, James, *The Bugaboo of Employment Quotas,* 1970 Wisconsin Law Review 340.

into a collective bargaining agreement in an attempt to eliminate the present effects of past discrimination in its workforce. This type of self-examination and the implementation of voluntary remedial steps reasonably calculated to rectify employment discrimination, where found, are the types of remedial measures envisioned by Congress when it enacted Title VII.

"Cooperation and voluntary compliance were selected as preferred means of achieving [the] . . . goal" *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 26 (1974), of assuring equal employment opportunities for all and erasing the relics and incidents of past discrimination.

In 1972, Title VII was amended to give the Equal Employment Opportunity Commission further authority, to ". . . . investigate individual charges of discrimination, *to promote voluntary compliance with the requirement of* Title VII, and to institute civil actions against employers or unions named in a discrimination charge." (Emphasis supplied), *Gardner-Denver, supra* at 44. The amendment was a reaffirmance of Congressional intent that employers use voluntarily imposed programs to eliminate present effects of past discrimination. Consistent with Congressional intent, the district courts have upheld voluntary compliance measures.

In *United* v. *Allegheny-Ludlam Industries, Inc.*, 517 F.2d 826, 846 (5th Cir., 1975), the court stated that voluntary compliance with Title VII is preferable. Said the court:

> ". . . it cannot be gainsaid that conciliation and voluntary settlement are the preferred means for resolving employment discrimination suits." *See* also, *Allegheny-Ludlam, supra.*

Title VII and Executive Order 11246 mandate that employers, "self-examine and self-evaluate their employment practices and . . . endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominous page in this country's history." *Albemarle, supra* at 418. By urging employers to enter into voluntary consent agreements, Congress is allowing the employer to devise a plan which will comply with Title VII and disrupt the employment business as little as possible. *Cf. Furnco Construction Corp.* v. *Waters*, —— U.S. ——, 98 S.Ct. 2943 (1978). Additionally, delay and expense are avoided.

In *United Jewish Organizations of Williamsburg* v. *Carey*, 430 U.S. 144, the court upheld the right of employers to voluntarily adopt race-conscious remedies to redress past discrimination. In *University of California Regents* v. *Bakke, supra,* this Court indicated, while not holding, that voluntary remedial programs to conform with Title VII are acceptable. It was correctly noted that:

> "In such cases, there has been detailed legislative consideration of various indicia of previous constitutional or statutory violations . . . and particular administrative bodies have been charged with monitoring various activities in order to detect such violations and appropriate remedies." Bakke, *supra* at 33, n. 41.

The program adopted by Kaiser and the Union was reasonable. The Agreement had positive features: it removed the requirement of prior craft experience for on-the-job training and provided for recruitment of in-house personnel to be trained as craftsmen, rather than recruiting from the outside. The Agreement set a goal of achieving 39% black participation in the

skilled craft positions at Kaiser. This percentage was the same as the percentage of Blacks in the available labor force in the community where the plant was located. To achieve this goal, it implemented dual seniority lines: one black and one white, and established an entrance ratio of one black or minority worker to one white worker admitted to the on-the-job training program.

The Agreement between Kaiser and the steelworkers benefits both white and black employees at Kaiser. By removing the requirement of previous craft experience for on-the-job training, and recruiting in-house employees for the training, rather than skilled craft persons from outside the workforce, Kaiser's white employees received a dual benefit from the Agreement. The black employees benefitted by being afforded training experience and a seniority status which they had long been denied as the result of a pattern and practice of racial discrimination in the plant.

Added to these features is the fact that the Agreement was the result of collective-bargaining between Kaiser and the Union. Where the majority workers choose union representation and these representatives enter into an Agreement with the employer, that Agreement is binding on the minority. 29 U.S.C. § 157, 158 (a)(3). *See NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). Accordingly, when Kaiser and the Union entered into the collective bargaining agreement here under attack, Weber became bound by that Agreement. To hold otherwise would be contrary to congressional intent:

> "In establishing a regime of majority rule, Congress sought to secure to all members of the unit the benefits of their collective strength and bar-

> gaining power, in full awareness that the superior strength of some individuals or groups might be subordinated to the interest of the majority." *Emporium Campbell Co.* v. *Western Addition Community Organization,* 420 U.S. 50, 68 (1975).

Even where, as in this case, the employee seeks to bargain separately with his employer as to the elimination of employment practices which he feels peculiarly affect him, he should not be allowed to do so. *Id.* This is particularly the case when the Agreement which the employee challenges was designed specifically to remedy the present effects of past discrimination in an employer's workforce.

Each feature of the Agreement here challenged was reasonable and specifically designed to reach the balance between compliance with Title VII and fairness, which the Guidelines require. Any attack on the Agreement must, therefore, fail.

IV.

IF THIS COURT CONCLUDES THAT TITLE VII REQUIRES A SHOWING OF SPECIFIC PRIOR DISCRIMINATION SUCH A SHOWING WAS PRESENT IN THE INSTANT CASE

A. There Is Ample Evidence to Support a Prima Facie Showing of Discrimination Against Blacks at Kaiser

There was ample evidence to show prior discrimination against minorities at the Kaiser plant at Gramercy, Louisiana to support a *prima facie* showing by articulated Title VII standards. The Supreme Court noted in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 802 (1973) the appropriate standard in establishing a *prima facie* case of racial discrimination:

> "The complainant in a Title VII trial must carry the initial burden under the statute of estab-

> lishing a *prima facie* case of [illegal] discrimination [based upon certain characteristics]. This may be done by showing (i) that he belongs to a . . . minority [having such characteristics]; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Once a *prima facie* case of discrimination is established, the plaintiff must show that facially neutral standards, in application, produced a significant and distinct discriminatory pattern.

Prior to the adoption of the 1974 Labor Agreement, Kaiser had hired personnel for its on-the-job craft training programs from outside the plant. The primary criterion for making the selection was prior craft experience. Up to 1974, the utilization of this selection criterion had resulted in the company employing five Blacks in craft positions, out of a total workforce of 290 craftsmen at its Gramercy facility. Thus, Blacks held less than 2% of the crafts positions in the plant. The prior experience requirement applied to all persons seeking positions in the on-the-job training program, but its obvious effect was to disproportionately reject black workers from participation in the program. The statistics regarding Blacks in the labor market and in Kaiser's workforce are telling here: 39% of the area workforce was black, and only 14.9% of Kaiser's workforce was black, an increase from around 10% in 1969.

The evidence adduced at trial that prior to 1969 the Company hired only "the best qualified, created a

strong inference that Kaiser had discriminated in the past by use of subjective and nonvalidated criteria which adversely affected minorities."

The Supreme Court has emphasized over and over again that a *prima facie* case of employment discrimination in violation of Title VII may be made out by showing that employment policies that are fair in form have a discriminatory impact on a Title VII protected class. *General Electric* v. *Gilbert,* 429 U.S. 125, 137 (1976); *Washington* v. *Davis,* 426 U.S. 229, 246-47 (1976); *Dothard* v. *Rawlinson,* 433 U.S. 321, 329 (1977); *Albemarle Paper Co.* v. *Moody, supra* at 425; *McDonnell Douglas Corp.* v. *Green, supra.* Case law supports the contention that once an employment standard produces a discriminatory effect, the employer must rebut the inference of discrimination by proving that the hiring requirements are job related and "serve the employer's legitimate interest in 'efficient and trustworthy workmanship'." *Albemarle Paper Co.* v. *Moody, supra* at 425 quoting *McDonnell Douglas Corp.* v. *Green, supra* at 801. The district court did not require and the defendants did not produce any evidence in rebuttal. This was clearly in error. Had the court required Kaiser to present such a showing, past discrimination would have been identified and supported by the past exclusion of minorities from on-the-job training programs.

The Supreme Court has repeatedly found that a significant statistical showing of minority employees compared with their percentage in the relevant labor market is in itself sufficient to establish a *prima facie* case for a Title VII violation. *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324 (1977), *Hazelwood School District* v. *United States,* 433 U.S.

—— (1977), *Dothard* v. *Rawlinson, supra.* There is also ample case law within the circuits supporting this point of view. *Wade* v. *Mississippi Cooperation Extension Service,* 528 F.2d 508, 518-17 (5 Cir. 1976); *United States* v. *Hayes International Corp.,* 457 F.2d 112, 120 (5th Cir. 1972); *Pettway* v. *American Cast Iron Pipe Co.,* 494 F.2d 211, 225 (5th Cir. 1974); *United States* v. *Chesapeake and Ohio Ry.,* 471 F.2d 582, 587 and N.7 (4th Cir. 1972), cert. denied, 411 U.S. 939 (1973); *Barnett* v. *W. T. Grant Co.,* 518 F.2d 543, 549 (4th Cir. 1975); *Parham* v. *Southwestern Bell Tele. Co.,* 433 F.2d 421, 426 (8th Cir. 1970); *Jones* v. *Lee Way Motor Freight, Inc.,* 431 F.2d 245, 247 (10th Cir. 1970), cert. denied, 401 U.S. 954 (1971).

Thus, we submit that the court below should have followed this standard and accorded weight to the statistical evidence identifying discrimination as articulated in *International Brotherhood of Teamster* v. *United States,*

> "[O]ur cases make it unmistakably clear that '[s]tatistical analysis have served and will continue to serve an important role' in cases in which the existence of discrimination is a disputed issue. *Mayor of Philadelphia* v. *Educational Equality League,* 415 U.S. 605, 620. See also *McDonnell Douglas Corp.* v. *Green, supra,* at 805. *Cf. Washington* v. *Davis,* 426 U.S. 229, 241-242. We have repeatedly approved the use of statistical proof, where it reached proportions comparable to those in this case, to establish a prima facie case of racial discrimination in jury selection cases, see, e.g., *Turner* v. *Fouche,* 396 U.S. 346; *Hernandez* v. *Texas,* 347 U.S. 475; *Norris* v. *Alabama,* 294 U.S. 587. Statistics are equally competent in proving employment discrimination. We caution only that statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances. See e.g., *Hester* v. *Southern R. Co.,* 497 F.2d 1374, 1379-1381 (CA5)." *Supra* at 339-340.

The statistics here not only warrant a strong inference that Blacks were discriminated against not only in terms of their representation in craft positions at Kaiser, compared to their representation in the company's workforce, but that they were also grossly underrepresented in the company's workforce as a whole, in comparison to their presence in the labor market area. The Supreme Court has repeatedly remarked that statistical showings of underrepresentation of minority group members is sufficient to establish a *prima facie* case of discrimination under Title VII. *International Brotherhood of Teamsters* v. *United States, supra* at 334-43 (1977); *Hazlewood School District* v. *United States, supra* at 307-311.

That these statistics should have given Kaiser even greater concern is evidenced by the fact that the same Fifth Circuit Court of Appeals, in a case involving another of Kaiser's Louisiana facilities, found that statistics reflecting that 3% of the craft workers were black, while 20% of the entire plant workers were black, constituted a *prima facie* showing of a Title VII violation. *Parson* v. *Kaiser Aluminum and Chemical Corp., supra* at 1390, n. 33.

We think the courts erred below in their future to consider, not only all of the facts before them, but what those facts actually meant. This is especially true in light of the fact that the real parties in interest here, those whose rights Title VII was primarily designed to protect, were not represented in this legisla-

tion, if for no other reason than to protect the equitable rights of Blacks. It is well settled that when federal courts sit to enforce federal rights, they have an obligation to apply federal equity principles. "When Congress leaves to the federal courts the formulation of remedial details, it can hardly expect them to break with historic principles of equity in the enforcement of federally-created equitable rights." *Holmberg* v. *Armbrecht,* 327 U.S. 392, 395 (1946).

B. The Voluntary Affirmative Action Plan Set Up by Kaiser Is Lawful Under Title VII

The Kaiser plant was well within the spirit and purpose of Title VII by creating two distinct lines of progression within the company's seniority system in order to correct the present effect of past discrimination as evidenced by the disproportionate statistics of minority employees.

After the passage of Title VII, investigations into allegations of discrimination revealed that what was done was the same for Blacks and Whites. Both groups were administered the *same* test, filled out the *same* applications, were required to obtain the *same* level of education as a pre-requisite for employment, were recruited for employment through the *same* system, and were subjected to the *same* loss of seniority rights when bidding on jobs in other departments. There was in other words no unequal treatment. However, Title VII case law has developed to the extent that even where the treatment is equal, the conduct may be illegal because of the consequences. The affirmative relief instituted by the Kaiser plant was an effort to correct a proved effect of discrimination—the low percentage of

black craftsmen at its plant, *Griggs* v. *Duke Power, supra.*

The record supports the fact that despite Kaiser efforts to increase its black workforce due to pressure from the federal government, the result was minuscule. Use of the same efforts to attract black craftsman produced unsuccessful results, only five out of the approximately 290 craftsmen at the plant were black. The union, also being an actionable defendant to a Title VII action was also subject to attack due to the low percent of minorities in the crafts. The union was justified in incorporating into its collective bargaining agreement, an affirmative remedial remedy.

> "The Griggs concept is bottomed on the 'consequences' or 'adverse effects' that challenged practices have on the employment opportunities of those protected by the Act. It is a broad concept that encompasses the following results: First, the present and/or continuing effects after July 2, 1965, at past discriminatory practices; secondly, present effects of present discriminatory practices even though no history of past discriminatory practices has been or can be demonstrated; and thirdly, present and past employment practices that have an adverse effect even if occasioned by benevolent motives, such as reliance on state protective legislation for women." See Belton, Robert. *Title VII of the Civil Rights Act of 1964: A Decade of Private Enforcement and Judicial Development,* 20 St. Louis Univ. L. J. 225, 245, 246 (1976).

Thus, had Kaiser not acted to correct the identified imbalance in its workforce, it would have been presumptively liable under Title VII. The voluntary nature of the company's act was a safeguard to avoid multiplicity of litigation.

The plant's selection criteria, which provided for a one-to-one hiring ratio implemented on the basis of racial seniority, is a proper remedial remedy to achieve a nondiscriminatory hiring goal. There was no intentional discrimination against the respondent, *Weber,* because the net effect did not create a clear and distinct nexus to intentional discrimination inspired by a neutral element of prejudice. Further, Kaiser's action in supporting racial minorities was not supported by an exclusionary motive. The statistics support the proposition that members of the majority race did not need a preference to matriculate in the system for there was a substantial number employed. This proposition is proven by the disproportionately high number of white employees at the plant.

The legislative purpose of Title VII was "to assure equality of employment opportunities and to eliminate those devices and discriminatory practices which have fostered racially stratified job environment to the disadvantage of minority citizens." *McDonnell Douglas Corp.* v. *Green, supra* at 800. To effectuate this purpose, Congress proscribed "not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." *Griggs* v. *Duke Power Co., supra.*

> "[A] milestone in the efforts to end discrimination in employment in the private sector was reached on July 2, 1965, when Title VII of the Civil Rights Act of 1964 became effective. The enactment of Title VII was a recognition by Congress of the evils of wide-spread and pervasive discriminatory practices in employment and an attempt to provide a remedy. The promise of the efficacy of the Act as a means to eliminate employment discrimination was, as Judge Gewin observed in *Miller* v. *International Paper Co.,* 408 F.2d 283, 294 (5th Cir. 1969); 'like a distant star over a swamp of uncertainty and perhaps of depair."

> The efforts to eliminate employment discrimination in the private sector during the past decade can be characterized as successful only if the progress and developments are compared, for example, to the long and largely inconclusive efforts to end discrimination in public education. In contrast to both are efforts to eliminate discrimination in places of public accommodations under Title II of the Civil Rights Act of 1965, which resulted in substantial success after only a few years of litigation. Optimism for future progress under fair employment laws can be expressed only because of the recent judicial and legislative perception of the causes and consequences of discrimination based upon one's race, sex, religion, or national origin."
>
> See Belton, Robert, *supra* p. 305.

We respectfully suggest that the court below should have reached the conclusion that the Kaiser plan was reasonable and comported with the intendment of Title VII.

CONCLUSION

The Amici respectfully urge this Court to reaffirm the fundamental holding of *Bakke* and reverse the judgment below. We feel compelled to suggest to this Court the urgency and the necessity for a strong forthright pronouncement to bring to full fruition the intendment of *Brown* v. *Board of Education,* 347 U.S. 483 (1954). The future health and welfare of this nation, both domestically and internationally, dictate that there must be no judicial retreat on the constitutional mandate that equality and freedom must be meaningful concepts for all people of our country.

Respectfully submitted,

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APPENDIX A

APPENDIX "A"

HISTORICALLY BLACK, JUNIOR, FOUR-YEAR, GRADUATE AND PROFESSIONAL INSTITUTIONS

Institution	Address	President/Chancellor
ALABAMA (13)		
Alabama A & M University	Normal, Alabama 35762	Dr. R. D. Morrison
Alabama Lutheran Academy	1804 Green Street Selma, Alabama 36701	Dr. Willis L. Wright
Alabama State University	P.O. Box 271 Montgomery, Alabama 36101	Dr. Levi Watkins
Bishop State Junior College	Mobile, Alabama 36603	Dr. S. D. Bishop
Daniel Payne College	6415 Washington Boulevard Birmingham, Alabama 35212	Dr. W. L. Mayes
Lawson State Community College	3060 Wilson Road Birmingham, Alabama 35221	Dr. Jesse E. Lewis
Lomax-Hannon College	South Conecuh Street Greenville, Alabama 36037	Dr. W. J. Longmire
Miles College	P. O. Box 3800 Birmingham, Alabama 35208	Dr. W. Clyde Williams

APPENDIX "A" Continued

Institution	Address	President/Chancellor
Oakwood College	Huntsville, Alabama 35806	Dr. Calvin B. Rock
Selma University	1501 Lapsley Street Selma, Alabama 36701	Dr. M. C. Cleveland, Jr.
Stillman College	P. O. Drawer 1430 Tuscaloosa, Alabama 35401	Dr. Harold N. Stinson
Talladega College	627 W. Battle Street Talladega, Alabama 35160	Dr. Joseph Nathan Gayles, Jr.
Tuskegee Institute	Tuskegee, Alabama 36088	Dr. Luther H. Foster
ARKANSAS (4)		
Arkansas Baptist College	1600 High Street Little Rock, Arkansas 72202	Attorney J. C. Oliver
Philander Smith College	812 West 13th Street Little Rock, Arkansas 72203	Dr. Walter R. Hazzard
Shorter College	604 Locust Street Little Rock, Arkansas 72204	Dr. R. J. Hampton
University of Arkansas (Pine Bluff)	North Cedar Street Pine Bluff, Arkansas 71601	Dr. Herman Smith (Chancellor)

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APPENDIX "A" Continued

DELAWARE (1)		
Delaware State College	N. Du Pont Highway Dover, Delaware 19901	Dr. Luna I. Mishoe
DISTRICT OF COLUMBIA (2)		
Howard University	2400 6th Street, N.W. Washington, D.C. 20059	Dr. James E. Cheek
University of the District of Columbia	4200 Connecticut Ave., N.W./Rm 301 Washington, D.C. 20008	Mr. Lisle C. Carter, Jr.
FLORIDA (4)		
Bethune-Cookman College	640 Second Avenue Daytona Beach, Florida 32014	Dr. Oswald P. Bronson
Edward Waters College	1658 Kings Road Jackson, Florida 32209	Dr. Cecil W. Cone
Florida A & M University	Tallahassee South Boulevard Tallahassee, Florida 32307	Dr. Walter L. Smith
Florida Memorial College	15800 N.W. 42nd Avenue Miami, Florida 33054	Dr. Willie C. Robinson

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APPENDIX "A" Continued

Institution	Address	President/Chancellor
GEORGIA (9)		
Albany State College	Hazard Drive Albany, Georgia 31705	Dr. Charles L. Hayes
Atlanta University	223 Chestnut Street, S.W. Atlanta, Georgia 30314	Dr. Cleveland L. Dennard
Clark College	240 Chestnut Street, S.W. Atlanta, Georgia 30314	Dr. Elias Blake, Jr.
Fort Valley State College	805 State College Drive Fort Valley, Georgia 31030	Dr. Cleveland W. Pettigrew
Morehouse College	223 Chestnut Street, S.W. Atlanta, Georgia 30314	Dr. Hugh M. Gloster
Morris Brown College	643 Martin Luther King Dr., N.W. Atlanta, Georgia 30314	Dr. Robert Threatt
Paine College	1235 Fifteenth Street Augusta, Georgia 30901	Dr. Julius S. Scott, Jr.
Savannah State College	State College Branch Savannah, Georgia 31400	Dr. Clyde W. Hall
Spelman College	350 Leonard Street, S.W. Atlanta, Georgia 30314	Dr. Donald M. Stewart

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APPENDIX "A" Continued

KENTUCKY (2)		
Kentucky State University	East Main Street Frankfort, Kentucky 40601	Dr. William A. Butts
Simmons University	1811 Dumesnil Street Louisville, Kentucky 40210	Dr. William L. Holmes
LOUISIANA (4)		
Dillard University	2601 Gentilly Boulevard New Orleans, Louisiana 70122	Dr. Samuel DuBois Cook
Grambling State University	P.O. Drawer 607 Grambling, Louisiana 71245	Dr. Joseph B. Johnson
Southern University System	Southern Branch Post Office	Dr. Jesse N. Stone, Jr., President
Southern University	Baton Rouge, Louisiana 70813	Dr. Roosevelt Steptoe, Chancellor
(Southern University)	6400 Press Drive New Orleans, Louisiana 70126	Dr. Emmett W. Bashful
(Southern University)	Shreveport, Louisiana	Dr. Leonard Barnes
Xavier University	7325 Palmetto Street New Orleans, Louisiana 70126	Dr. Norman C. Francis

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APPENDIX "A" Continued

Institution	Address	President/Chancellor
MARYLAND (4)		
Bowie State College	Jericho Park Road Bowie, Maryland 20715	Dr. Rufus L. Barfield
Coppin State College	2500 West North Avenue Baltimore, Maryland 21216	Dr. Calvin Burnett
Morgan State University	Cold Spring Lane & Hillen Road Baltimore, Maryland 21239	Dr. Andrew Billingsley, Jr.
University of Maryland (Eastern Shore)	Princess Ann, Maryland 21853	Dr. William P. Hytche Chancellor
MICHIGAN (1)		
Shaw College at Detroit	7351 Woodward Avenue Detroit, Michigan 48202	Dr. Romallus O. Murphy
MISSISSIPPI (11)		
Alcorn State University	Rural Station Lorman, Mississippi 39096	Dr. Walter Washington
Coahoma Junior College	Route 1, Box 616 Clarksdale, Mississippi 38614	Dr. James E. Miller

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APPENDIX "A" Continued

Jackson State University	1400 Lynch Street Jackson, Mississippi 39217	Dr. John A. Peoples, Jr.
Mary Holmes College	P. O. Box 336 West Point, Mississippi 39773	Dr. Joseph A. Gore
Mississippi Industrial College	Holly Springs, Mississippi 38635	Dr. Theodore Debro
Mississippi Valley State University	Highway 82 West Itta Bena, Mississippi 38941	Dr. E. A. Boykins
Natchez Junior College	1010 Ext. N. Union Natchez, Mississippi 39120	Dr. Peter Rucker
Prentiss Normal & Industrial Institute (Prentiss Institute Junior College)	Drawer C Prentiss, Mississippi 39474	Dr. A. L. Johnson
Rust College	Rust Avenue Holly Springs, Mississippi 38635	Dr. W. A. McMillan
Tougaloo College	Tougaloo, Mississippi 39174	Dr. George A. Owens
Utica Junior College	Utica, Mississippi 39175	Dr. J. Louis Stokes
MISSOURI (1)		
Lincoln University	Jefferson City, Missouri 65101	Dr. James Frank

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APPENDIX "A" Continued

Institution	Address	President/Chancellor
NORTH CAROLINA (11)		
Barber-Scotia College	Cabarrus Avenue Concord, North Carolina 28025	Dr. Mable P. McLean
Bennett College	Washington Street Greensboro, North Carolina 27909	Dr. Issac H. Miller, Jr.
Elizabeth City State University	Elizabeth City, North Carolina 27909	Dr. Marion D. Thorpe (Chancellor)
Fayetteville State University	Newbold Station Fayetteville, North Carolina 28301	Dr. Charles "A" Lyons, Jr. (Chancellor)
Johnson C. Smith University	100-152 Beatties Ford Road Charlotte, North Carolina 28216	Dr. Wilbert Greenfield
Livingstone College	701 W. Monroe Street Salisbury, North Carolina 28144	Dr. F. George Shipman
North Carolina A & T State University	312 North Dudley Street Greensboro, North Carolina 27411	Dr. Lewis C. Dowdy, Sr. (Chancellor)
North Carolina Central University	Fayetteville Street Durham, North Carolina 27707	Dr. Albert N. Whiting (Chancellor)
Shaw University	118 E. South Street Raleigh, North Carolina 27611	Dr. Stanley H. Smith

APPENDIX "A" Continued

St. Augustine's College	1315 Oakwood Avenue Raleigh, North Carolina 27611	Dr. Prezell R. Robinson
Winston-Salem State University	Winston-Salem, North Carolina 27102	Dr. H. Douglas Covington (Chancellor)
OHIO (2)		
Central State University	Wilberforce, Ohio 45384	Dr. Lionel Newsom
Wilberforce University	Wilberforce, Ohio 45384	Dr. Charles E. Taylor
OKLAHOMA (1)		
Langston University	P.O. Box 907 Langston, Oklahoma 73050	Dr. Samuel J. Tucker
PENNSYLVANIA (2)		
Cheyney State College	Cheyney, Pennsylvania 19319	Dr. Wade Wilson
Lincoln University	Lincoln University, Pennsylvania 19352	Dr. Herman R. Branson
SOUTH CAROLINA (8)		
Allen University	1530 Harden Street Columbia, South Carolina 29204	Dr. Alvis V. Adair

APPENDIX "A" Continued

Institution	Address	President/Chancellor
Benedict College	Harden & Blanding Streets Columbia, South Carolina 29204	Dr. Henry Ponder
Claflin College	700 College Avenue Orangeburg, South Carolina 29115	Dr. H. V. Manning
Clinton Junior College	Rock Hill, South Carolina 29732	Dr. Sallie V. Moreland
Friendship College	P.O. Box 10750 Rock Hill, South Carolina 29730	Dr. Charles W. Petress
Morris College	North Main Street Sumter, South Carolina 29150	Dr. Luns C. Richardson
South Carolina State College	P.O. Box 1885 Orangeburg, South Carolina 29117	Dr. M. Maceo Nance, Jr.
Voorhees College	Denmark, South Carolina 29042	Dr. George B. Thomas
TENNESSEE (7)		
Fisk University	17th Avenue, North Nashville, Tennessee 37203	Dr. Walter J. Leonard
Knoxville College	901 College Street Knoxville, Tennessee 37921	Dr. Rutherford H. Adkins

APPENDIX "A" Continued

Lane College	545 Lane Avenue Jackson, Tennessee 38301	Dr. Herman Stone, Jr.
LeMoyne-Owen College	807 Walker Avenue Memphis, Tennessee 38126	Dr. Walter L. Walker
Meharry Medical College	1005 18th Avenue, North Nashville, Tennessee 37208	Dr. Lloyd C. Elam
Morristown College	417 North James Street Morristown, Tennessee 37814	Dr. Raymon E. White
Tennessee State University	3500 Centennial Boulevard Nashville, Tennessee 37203	Dr. Frederick S. Humphries
TEXAS (9)		
Bishop College	3837 Simpson-Stuart Road Dallas, Texas 75241	Dr. Milton K. Curry, Jr.
Huston-Tillotson College	1820 E. 8th Street Austin, Texas 78702	Dr. John Q. T. King
Jarvis Christian College	P.O. Drawer G Hawkins, Texas 75765	Dr. E. W. Rand

APPENDIX "A" Continued

Institution	Address	President/Chancellor
Paul Quinn College	1020 Elm Street Waco, Texas 76704	Dr. William D. Watley
Prairie View A & M University	Prairie View, Texas 77445	Dr. A. I. Thomas
Southwestern Christian College	P.O. Box 10 Terrell, Texas 75160	Dr. Jack Evans
Texas College	Tyler, Texas 75702	Dr. Allen C. Hancock
Texas Southern University	3201 Wheeler Avenue Houston, Texas 77004	Dr. Granville M. Sawyer
Wiley College	711 Rosborough Spring Road Marshall, Texas 75670	Rev. Robert Hayes
VIRGINIA (6)		
Hampton Institute	East Queen Street Hampton, Virginia 23668	Dr. William R. Harvey
Norfolk State College	2401 Corprew Avenue Norfolk, Virginia 23504	Dr. Harrison B. Wilson
St. Paul's College	Lawrenceville, Virginia 23868	Dr. James A. Russell, Jr.
The Virginia College	Garfield Avenue & Dewitt Street Lynchburg, Virginia	Dr. M. C. Southerland

APPENDIX "A" Continued

Virginia State College	P.O. Box I Petersburg, Virginia 23803	Dr. Thomas M. Law
Virginia Union University	1500 N. Lombardy Street Richmond, Virginia 23220	Dr. Allix B. James

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